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TRINKO: A KINDER, GENTLER APPROACH TO DOMINANT FIRMS UNDER THE ANTITRUST LAWS?

Edward D. Cavanagh

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TRINKO: A KINDER, GENTLER APPROACH TO DOMINANT FIRMS UNDER THE ANTITRUST LAWS?

Edward D. Cavanagh*

I. INTRODUCTION

Section 2 of the Sherman Act¹ prohibits monopolization, attempted monopolization and conspiracy to monopolize.² The § 2 prohibitions are rooted in concerns "that possession of unchallenged economic power deadens initiative, discourages thrift and depresses energy; that immunity from competition is a narcotic, and rivalry is a stimulant, to industrial progress; that the spur of constant stress is necessary to counteract an inevitable disposition to let well enough alone."³ At the same time, courts have recognized that size alone cannot be the basis of condemnation under § 2,⁴ for as Learned Hand observed in *Alcoa*,⁵ "[t]he successful competitor, having been urged to compete, must not be turned upon when he wins."⁶ Reconciling the conflicting currents of § 2—preventing abusive practices by dominant firms without, at the same time, chilling the competitive vigor of dominant firms—has proven to be a difficult task for the courts because "it is sometimes difficult to distinguish robust competition from conduct with long-run anticompetitive effects."⁷

Early monopolization cases found violations based on predatory acts,⁸ exclusionary conduct,⁹ or refusals to deal.¹⁰ However, the decisions in these cases were more the product of each court's visceral reaction to the cases in question rather than the end

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1. 15 U.S.C. § 2 (2000).

2. *Id.*

3. *United States v. Aluminum Co. of Am. (Alcoa)*, 148 F.2d 416, 427 (2d Cir. 1945).

4. *See, e.g., Standard Oil Co. v. United States*, 221 U.S. 1, 62 (1911) (Section 2 does not prohibit monopoly "in the concrete"); *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 273 (2d Cir. 1979) ("Section 2 does not prohibit monopoly *simpliciter*").

5. *Alcoa*, 148 F.2d at 430.

6. *Id.*

7. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 767-68 (1984); *See, e.g., Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 458-59 (1993). Similarly in *Spectrum Sports*, the Supreme Court noted

[T]his Court and other courts have been careful to avoid constructions of § 2 which might chill competition, rather than foster it. It is sometimes difficult to distinguish robust competition from conduct with long-term anticompetitive effects; moreover, single-firm activity is unlike concerted activity covered by § 1, which "inherently is fraught with anticompetitive risk."

Id. (citing *Copperweld*, 467 U.S. at 767-69).

8. *See, e.g., Standard Oil*, 221 U.S. at 1.

9. *See, e.g., Alcoa*, 148 F.2d at 416.

10. *See, e.g., Lorain Journal Co. v. United States*, 342 U.S. 143 (1951).

result of hard legal analysis of § 2 and thus provided insufficient guidance for later cases.¹¹

Subsequently, courts moved to a more conduct-specific standard in analyzing monopolization cases. This conduct-specific standard is perhaps best exemplified by the Supreme Court's ruling in *Grinnell*¹² that in order to prove monopolization, plaintiff must show (1) that defendant possessed monopoly power, i.e., the power to control price or to exclude competition; and (2) "willful acquisition or maintenance of [monopoly] power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."¹³ Simply put, the offense of monopolization is made out by proof of defendant's size plus its bad acts. Under *Grinnell*, "bad acts" include predatory pricing,¹⁴ leveraging,¹⁵ and refusals to share an essential facility.¹⁶ While a step forward analytically, the conduct-specific approach does not address all types of conduct that might violate § 2. Particularly troublesome for the courts has been conduct by dominant firms that excludes rivals. While a consensus has emerged in cases involving exclusionary pricing practices by dominant firms,¹⁷ the law with respect to non-price exclusionary behavior by dominant firms remains very much up in the air; and the question of when a dominant firm may lawfully refuse to deal with rivals and thereby exclude them from the field is "one of the most uncertain areas in all of U.S. antitrust law."¹⁸ Such uncertainty has led lower

11. *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 273 (2d Cir. 1979) (noting that, in trying to reconcile "the crosscurrents and pulls and tugs of § 2," the "cryptic" opinion in *Alcoa* created "a litigant's wishing well, into which, it sometimes seems, one may peer and find nearly anything he wishes").

12. *United States v. Grinnell Corp.*, 384 U.S. 563 (1966).

13. *Id.* at 570-71.

14. *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222-24 (1993) (explaining that to establish predatory pricing, plaintiff must prove that defendant sold at prices "below an appropriate measure" of defendant's cost and that the defendant had a "dangerous probability[] of recouping its investment in below cost prices").

15. *United States v. Griffith*, 334 U.S. 100, 108 (1948) (describing that the use of monopoly power in theaters in one city to obtain exclusive motion picture distribution rights in cities where competition existed, amounted to illegal monopolization).

16. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985) (holding that rival's withdrawal from a long and profitable joint marketing arrangement to the detriment of its former partner without business justification constitutes a violation of § 2).

17. *Brooke Group*, 509 U.S. at 222-24.

18. Robert Pitofsky, *Past, Present and Future Antitrust Enforcement at the Federal Trade Commission*, 72 U. CHI. L. REV. 209, 217 (2005). Additionally, Robert Pitofsky stated:

I wrote recently that questions concerning the nature of the behavior by a monopolist that violates Section 2 "is one of the most uncertain areas of antitrust." I add that the uncertainty is costly to sellers and consumers. Sellers may be unduly timid in selecting competitive strategies because they don't know where the line is describing permissible conduct; as a result, consumers may be denied efficiencies or other benefits they would enjoy if the antitrust laws were more certain.

I assume at the core antitrust would declare illegal conduct by a monopolist that is unreasonably exclusionary. . . . Some issues are easy to decide. For example, cases that involve lowering prices above some standard of cost, improving products, investing in innovation are all in the safe harbor usually entitled "superior skill[,] foresight and industry." On the other hand, behavior by a monopolist that violates some other provision of the antitrust laws, such as procuring a patent by fraud on the Patent Office, or selling at what eventually is recognized as "below cost," are almost always indefensible.

courts most recently to try to develop a “one size fits all” test for exclusionary conduct.¹⁹ Against this background, the Supreme Court entertained the *Trinko*²⁰ case.

The Court in *Trinko* held that Verizon was not liable under the antitrust laws to a customer of rival AT&T for its failure to provide AT&T prompt access to the Verizon local phone network, which the plaintiff alleged caused it to experience inferior local phone service.²¹ In so holding, the Court declined to embrace any bright-line rules addressing monopolistic refusals to deal but spent considerable energy making the case for a more tolerant approach to dominant firms. This article will explore the impact of the *Trinko* decision on the lower courts. Courts at both the trial and intermediate appellate levels have been cautious in their responses to *Trinko*. Unquestionably, the lower courts even after *Trinko* remain suspicious of exclusionary behavior by dominant firms and continue their search for a principled basis upon which to distinguish lawful from unlawful exclusionary behavior by dominant firms. Accordingly, *Trinko* does not mark an abrupt departure from the doctrine of prior cases but rather underscores the lack of clarity on the issue of when non-price exclusionary behavior by a monopolist is unlawful under § 2.

II. *TRINKO*

A. *The Decision*

In *Trinko*, a unanimous Supreme Court reversed a Second Circuit decision holding that a breach of obligations imposed by the Telecommunications Act of 1996²² by defendant telephone company did not *ipso facto* give rise to a monopolization claim under § 2 of the Sherman Act²³ on behalf of a local telephone service customer of defendant’s rival.²⁴ The Court found that the Telecommunications Act does not create any additional antitrust liability but merely preserves pre-existing antitrust standards.²⁵ Finally, the Court ruled that the case does not fit within the small category of cases that constitute an exception to the general rule that there is no duty to aid rivals,²⁶ nor does

Refusal to deal cases fall in the vast gray area between those clear cases and are therefore very difficult to decide. On the one hand, it is settled law that a seller can pick and choose among its customers (at least where its purpose is not to achieve or maintain a monopoly) and has no obligation to offer affirmative assistance to prospective rivals. On the other hand, an abrupt discontinuance of prior dealings with the purpose and effect of injuring the competitive process has been found (correctly, I believe) to be an antitrust violation unless there are significant business justifications.

Robert Pitofsky, *Standards For Exclusionary Behavior Under Section 2 of the Sherman Act, Comments to the Antitrust Modernization Commission*, September 29, 2005, www.amc.gov/commission__hearings/pdf/Pitofsky.pdf [hereinafter Pitofsky Testimony] (footnotes omitted).

19. The so-called “profit sacrifice test” encompasses this approach. See *infra* notes 106-113 and accompanying text.

20. *Verizon Commc’ns, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004).

21. *Id.* at 407-16.

22. 47 U.S.C. § 251(c) (2000).

23. 15 U.S.C. § 2 (2000).

24. *Trinko*, 540 U.S. at 407; *Greco v. Verizon Commc’ns, Inc.*, 2005 WL 659200, at *3 n.3 (S.D.N.Y. Mar. 22, 2005).

25. *Trinko*, 540 U.S. at 407.

26. *Id.* at 409-11.

it call for a new exception to the Sherman Act requiring a monopolist to deal with a rival.²⁷

Defendant Verizon is a successor to one of the regional operating companies created by the break-up of AT&T in 1982. Prior to enactment of the Telecommunications Act of 1996, Verizon enjoyed an exclusive franchise in its local telephone service area.²⁸ The Telecommunications Act sought to spur competition in local service and required incumbent local service providers, such as Verizon, to share its local network with competitors.²⁹ Verizon agreed to provide rival AT&T with access to its network.³⁰ In 1999, AT&T and other rivals of Verizon complained to state and federal regulators that many orders were going unfilled in violation of Verizon's obligations to provide access to its local service network.³¹ Thereafter, Verizon was found by both the New York Public Service Commission (PSC) and the Federal Communications Commission (FCC) to have breached its obligations under the 1996 Act to AT&T.³² Verizon was assessed significant fines by the PSC and the FCC.³³ Following the FCC action, plaintiff, a New York City law firm and AT&T local service customer, commenced a monopolization action under § 2 of the Sherman Act, claiming that Verizon's breach of its agreement with AT&T had caused poor service to AT&T customers and had discouraged Verizon customers from becoming customers of rival local service providers.³⁴

The trial court dismissed the complaint, but the Second Circuit reversed, reinstating the claim in part, including the antitrust claim.³⁵ The Supreme Court reversed and remanded.³⁶ In so holding, the High Court posed and analyzed four questions: (1) Does the Telecommunications Act of 1996 create additional antitrust liability? (2) Does the conduct in question violate traditional antitrust standards? (3) Does the conduct fit within the exception established in *Aspen Skiing*? (4) Should a new exception be created?³⁷

1. Telecommunications Act of 1996

The Court ruled that the Telecommunications Act did not create additional antitrust burdens for telephone companies.³⁸ Rather, the Act merely preserves those claims that satisfy established antitrust standards.³⁹ The Act's preservation clause in turn would preclude any defense by Verizon of implied antitrust immunity based on the 1996 Act.⁴⁰

27. *Id.* at 411.

28. *Id.* at 402.

29. *Id.*

30. *Id.*

31. *Id.* at 403.

32. *Id.* at 403-04.

33. *Id.* at 404.

34. *Id.*

35. *Id.* at 405.

36. *Id.* at 416.

37. *See id.* at 401-16.

38. *Id.* at 406-07.

39. *Id.* at 407.

40. *Id.*

2. Traditional Antitrust Standards

The Court summarized the law of monopolization, emphasizing that possession of monopoly power itself is not unlawful; only when monopoly power is accompanied by anticompetitive conduct will an antitrust violation occur.⁴¹ The Court underscored the long-recognized right of traders to select those with whom they will deal.⁴² It further observed that a monopolist ordinarily may reap the fruits of its labor, noting that "[t]he opportunity to charge monopoly prices—at least for a short period—is what attracts 'business acumen' in the first place; it induces risk taking that produces innovation and economic growth."⁴³ To protect these incentives to innovate, courts will not condemn possession of monopoly power "unless it is accompanied by an element of anticompetitive conduct."⁴⁴

The Court also pointed out that firms may acquire monopoly power by creating an infrastructure that "renders them uniquely suited to serve their customers," hinting that this was precisely what Verizon had done.⁴⁵ Forced sharing of such infrastructures would, according to the Court, run counter to basic antitrust principles. First, requiring a monopolist to share those fruits may chill innovation and may cast judges as central planners—roles for which the courts are ill-suited.⁴⁶ Second, forced access would compel rivals to negotiate and thereby create the risk of collusive behavior.⁴⁷ Third, forced sharing would undermine the long-recognized right of a trader to choose its own customers.⁴⁸ The Court concluded that Verizon's refusal to share its infrastructure with AT&T could not give rise to liability for monopolization under traditional standards.

3. Aspen Skiing

At the same time, the Court recognized that a trader's "right to refuse to deal with other firms is not unqualified."⁴⁹ In *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*,⁵⁰ the Court had previously held that a monopolist's withdrawal from a long-standing and profitable joint marketing arrangement was unlawfully exclusionary, where the withdrawal brought about an important change in the market and where the monopolist offered no valid business justification for its conduct.⁵¹ In *Trinko*, the Court concluded that *Aspen Skiing* was inapposite.⁵² The Court first stated that the *Aspen Skiing* exception has been applied cautiously "because of the uncertain virtue of forced sharing and the difficulty of identifying and remedying anticompetitive conduct by a single firm."⁵³ The Court then distinguished *Aspen Skiing*, which it

41. *Id.*

42. *Id.* at 408 (citing *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919)).

43. *Id.* at 407.

44. *Id.*

45. *Id.*

46. *Id.* at 408.

47. *Id.*

48. *Id.* (citing *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919)).

49. *Id.* (quoting *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 601 (1985)).

50. 472 U.S. 585 (1985).

51. *Id.* at 601.

52. *Trinko*, 540 U.S. at 409-10.

53. *Id.* at 408.

described as “at or near the outer boundary of § 2 liability.”⁵⁴ It pointed out that *Aspen Skiing* involved an ongoing and presumably profitable venture unilaterally terminated by the defendant.⁵⁵ The Court stated that defendant’s conduct there “suggested a willingness to forsake short-term profits to achieve an anticompetitive end.”⁵⁶ Equally important, defendant’s refusal to renew the venture, even if compensated at retail levels, “revealed a distinctly anticompetitive bent.”⁵⁷

The Court found that the facts here did not fit within the *Aspen Skiing* rationale.⁵⁸ Unlike the defendant in *Aspen Skiing*, Verizon did not have an ongoing relationship with AT&T prior to the passage of the Telecommunications Act.⁵⁹ Accordingly, prior conduct “sheds no light” on Verizon’s motivation not to deal and creates no inference of anticompetitive malice.⁶⁰ More importantly, pricing behavior was different: in *Aspen Skiing*, defendant declined compensation at retail levels, from which one could infer monopolistic intent; Verizon’s compensation was cost-based, which reveals nothing of Verizon’s motivations.⁶¹ The Court further distinguished *Aspen Skiing* by pointing out that in that case the services withheld had previously been available to the public, whereas the Verizon services withheld were not available to the public.⁶² Accordingly, *Aspen Skiing* did not govern.⁶³

In so ruling, the Court called into question the essential facilities doctrine recognized by lower courts.⁶⁴ Without passing on the merits of the essential facilities doctrine, the Court concluded that it would not be applicable on these facts because the Telecommunications Act mandated Verizon to give rivals access to its facilities.⁶⁵

4. New Exceptions

The Court concluded that the facts of this case do not call for a new exception to the rule that a monopolist has no duty to aid rivals.⁶⁶ The Court observed that the extensive regulatory network in place in telecommunications “diminishes the likelihood of major antitrust harm.”⁶⁷ Moreover, any marginal benefit derived from antitrust intervention would be outweighed by the cost of enforcement.⁶⁸ In particular, the Court pointed out that the application of § 2 requirements is difficult, and the potential means of illegal exclusion are myriad.⁶⁹ The Court also pointed to the high cost of

54. *Id.* at 409.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.* at 410; cf. *Otter Tail Power Co. v. United States*, 410 U.S. 366, 378 (1973) (finding defendant liable for monopolistic refusal to deal had provided other customers the services that plaintiff sought).

63. *Trinko*, 540 U.S. at 410.

64. *Id.* at 410-11.

65. *Id.* at 411.

66. *Id.*

67. *Id.* at 412 (citing *Concord v. Boston Edison Co.*, 915 F.2d 17, 25 (1st Cir. 1990)).

68. *Id.* at 414.

69. *Id.* at 414 (citing *United States v. Microsoft Corp.*, 253 F.3d 34, 58 (D.C. Cir. 2001)).

error if the antitrust laws are mistakenly applied.⁷⁰ The Court noted the difficulties of assessing the duties imposed by the Telecommunications Act and the potential for “interminable litigation” was antitrust used as a weapon.⁷¹ Finally, the Court found that having antitrust courts policing conduct under the Telecommunications Act would create intolerable administrative burdens and transform antitrust courts into regulatory agencies.⁷² While the Sherman Act is the “Magna Carta of free enterprise,”⁷³ the Act “does not give judges *carte blanche* to insist that a monopolist alter its way of doing business wherever some other approach might yield greater competition.”⁷⁴

B. Analysis

The *Trinko* decision is intriguing in several respects. First, the Court made sweeping pronouncements on the law of monopolization on a very truncated record. The Court also delved into the merits without even addressing the threshold standing issue. Second, the Court might have simply held that violations of the Telecommunications Act of 1996 do not create additional antitrust obligations and limited its analysis to the precise factual context in which the case arose. Instead, the Court enunciated broader principles seemingly applicable to all § 2 cases, and not simply those involving the highly regulated telecommunications arena. Third, having chosen to delve into the merits of an alleged non-price based monopolistic refusal to deal, the Court declined to adopt a bright-line rule delineating lawful and unlawful conduct.⁷⁵

1. Procedural Posture

Trinko came to the Court on Verizon’s preanswer motion to dismiss for failure to state a claim upon which relief could be granted.⁷⁶ In such cases, federal courts must assume the facts alleged in the complaint are true and may not dismiss “unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.”⁷⁷ The focus, then, is on the adequacy of the complaint and not on any fact-based defenses that a defendant might raise.

Yet the Court did not even pay lip service to the standards it has established in adjudicating motions to dismiss. Not only did the Court fail to assume the truth of the allegations of the complaint, it went further, prying out and piecing together from the appellate briefs and prior administrative hearings—there was no answer to reference—

70. *Trinko*, 540 U.S. at 414.

71. *Id.*

72. *Id.* at 415.

73. *Id.* (citing *United States v. Topco Assocs., Inc.* 405 U.S. 596, 610 (1972)).

74. *Id.* at 415-16.

75. See Eleanor M. Fox, *Is There Life in Aspen After Trinko: The Silent Revolution of Section 2 of the Sherman Act*, 73 ANTITRUST L.J. 153, 162 (“Nowhere does [the *Trinko* Court] canvas the range of theories that could and should support a Section 2 violation and nowhere does it reason that a violation may be found only in cases involving profit sacrifice.”).

76. *Trinko*, 540 U.S. at 405.

77. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). As the late Professor Charles Alan Wright wrote, “[t]his rule, which has been stated literally thousands of times, precludes final dismissal for insufficiency of the complaint except in the extraordinary case in which the pleader makes allegations that show on the face of the complaint some insuperable bar to relief.” CHARLES ALAN WRIGHT AND MARY KAY KANE, *LAW OF FEDERAL COURTS* § 68(4) (6th ed. 2002).

a “factual record” supporting Verizon’s motion to dismiss. Among the Court’s “findings” were: (1) Verizon had created a valuable infrastructure,⁷⁸ (2) the unbundled elements to which access is mandated by the Telecommunications Act of 1996 “exist only deep within the bowels of Verizon,”⁷⁹ (3) access could be offered by Verizon only “at considerable expense and effort,”⁸⁰ and (4) new systems must be “implemented simply to make that access possible.”⁸¹

From the “findings” the Court concluded that the benefits of antitrust intervention would be outweighed by the risk of false positives and by the costs that such intervention would impose on the judicial system.⁸² For example, the Court found that Verizon’s failure to provide prompt interconnect services might have nothing to do with exclusion.⁸³ The Court observed that violations of duties under the Telecommunications Act “are difficult for antitrust courts to evaluate, not only because they are highly technical, but also because they are likely to be extremely numerous, given the incessant, complex, and constantly changing interactions of competitive and incumbent LECs implementing the sharing and interconnection obligations.”⁸⁴ The Court also concluded that identifying anticompetitive acts would be “a daunting task for a generalist antitrust court” and that oversight of obligations created by the 1996 Act “would seem destined to distort investment and lead to a new layer of interminable litigation.”⁸⁵ Closely related to the foregoing conclusion was the Court’s concern that forced sharing would create duties to deal that could not be adequately supervised by a district court and that threatened to turn the federal courts into a regulatory agency.⁸⁶

At the end of the day, the *Trinko* Court may very well be proven correct. The disposition of this case on the record properly before the Court, however, was clearly premature and at odds with the well-established legal standards for adjudicating motions to dismiss. Equally troublesome was the Court’s rush to address the merits when, as Justice Stevens notes in his concurrence, serious questions of standing exist.⁸⁷ AT&T was clearly the target of Verizon’s allegedly exclusionary behavior. Plaintiff *Trinko* may well have been injured in its “business or property” within the meaning of section 4 of the Clayton Act,⁸⁸ but the courts have long recognized that the antitrust laws cannot compensate for every “ripple of injury” caused by an antitrust violation.⁸⁹ In particular, courts will not entertain plaintiffs whose claims are derivative or consequential.⁹⁰ As Justice Stevens wrote: *Trinko* lacks standing since “it remains the case that whatever antitrust injury respondent suffered because of Verizon’s conduct

78. *Trinko*, 540 U.S. at 407.

79. *Id.* at 410.

80. *Id.*

81. *Id.*

82. *Id.* at 414.

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* at 415.

87. *Id.* at 416 (Stevens, J., concurring).

88. 15 U.S.C. § 15(a) (2000).

89. *Blue Shield of Va. v. McCready*, 457 U.S. 465, 476-77 (1982); *accord Andrx Pharm., Inc. v. Biovail Corp. Int’l*, 256 F.3d 799, 806 (D.C. Cir. 2001).

90. See e.g., *Associated Gen. Contractor v. California State Council of Carpenters*, 459 U.S. 519, 533-34 (1983).

was purely derivative of the injury that AT&T suffered.”⁹¹ Given that *Trinko*’s injury was purely derivative, permitting the claim to go forward raises significant risks of duplicative recovery and the danger of complex apportionment of damages.⁹² Accordingly, the Court could have, and should have, disposed of this case on standing grounds.

2. Telecommunications or Antitrust?

Trinko can be read in at least two ways. One way is to view *Trinko* narrowly as a case decided in the context of a heavily regulated telecommunications industry where access to rivals’ facilities is mandated by statute. Under the narrow view, *Trinko* stands for the proposition that violations of the Telecommunications Act do not themselves create separate claims for relief under the antitrust laws.⁹³ Nor should a dominant firm’s refusals to deal be condemned under traditional antitrust principles where, as in the case of telecommunications, the industry has a heavy regulatory overlay that includes mandated access to rival’s facilities, particularly where the regulatory authorities have already sanctioned the dominant firm for the conduct in question.⁹⁴

A second, broader view is that *Trinko* applies to all § 2 cases. That view suggests a more tolerant approach to monopolists so as to avoid false condemnation of behavior that is efficiency-enhancing and promotes innovation and economic growth. This second approach, which links monopoly with innovation and economic growth, would be a radical restatement of § 2 principles. Specifically, this broader approach would turn traditional § 2 analysis upside down by focusing the attention of the courts initially on the benefits of exclusionary behaviors (efficiencies) instead of starting the analysis with the exclusionary aspects (anticompetitive effects) of the dominant firm’s behavior.

3. What is “Exclusionary Behavior?”

Whether its decision is read narrowly or broadly, the Court in *Trinko* shed little light on when a monopolist’s refusal to deal constitutes a violation of § 2. That question continues to generate debate among antitrust scholars⁹⁵ and confusion in the courts.⁹⁶ Part of that debate has been resolved by the Supreme Court. Where a monopolist uses price as a weapon to exclude, there is a general consensus that the

91. *Trinko*, 540 U.S. at 417 (Stevens, J., concurring).

92. *Associated Gen. Contractors*, 459 U.S. at 543-44.

93. See *Greco v. Verizon Commc’ns, Inc.*, 2005 WL 659200, at *3 n.3 (S.D.N.Y. Mar. 22, 2005).

94. See *id.*

95. See Einer Elhauge, *Defining Better Monopolization Standards*, 56 STAN. L. REV. 253, 267-70 (2003); Andrew I. Gavil, *Exclusionary Distribution Strategies by Dominant Firms: Striking a Better Balance*, 72 ANTITRUST L.J. 3, 3-5 (2004); Herbert Hovenkamp, *Exclusion and the Sherman Act*, 72 U. CHI. L. REV. 147, 151-62 (2005); Mark R. Patterson, *The Sacrifice of Profits in Non-Price Predation*, ANTITRUST, Fall 2003, at 37; Pitofsky, *supra* note 18, at 216-17.

96. See also *LePage’s, Inc. v. 3M Co.*, 324 F.3d 141 (3d Cir. 2003) (upholding jury verdict that monopolist’s use of bundled rebates violates § 2 of the Sherman Act). Compare *Image Technical Servs., Inc. v. Eastman Kodak Co.*, 125 F.3d 1195 (9th Cir. 1997) (holding Kodak violated § 2 by refusing to deal with rival service providers), with *In re Indep. Serv. Orgs. Antitrust Litigs.*, 203 F.3d 1322 (Fed.Cir. 2000) (holding owner of patents or copyrights has no duty to deal with rivals).

conduct is unlawful if and only if the monopolist (1) is pricing below some accepted measure of cost; and (2) has a plan to recoup short-run losses from sales below cost through the long-run supracompetitive pricing, once shallow pocket rivals have been eliminated.⁹⁷ However, no such consensus exists with respect to non-price exclusionary behavior, the issue at stake in *Trinko*.

The Court in *Trinko* began its analysis with the rule articulated in *Colgate* stating “as a general matter, the Sherman Act ‘does not restrict the long recognized right of [a] trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal.’”⁹⁸ The Court in *Trinko*, did not point out, as it might have, that even in *Colgate*, the “long recognized right” not to deal is limited to those cases where the refusal to deal is carried out “[i]n the absence of any purpose to create or maintain a monopoly.”⁹⁹ Nevertheless, the Court, reaffirming its decision in *Aspen Skiing*, did state that “[t]he high value that we have placed on the right to refuse to deal with other firms does not mean the right is unqualified.”¹⁰⁰ Still, its embrace of *Aspen Skiing* was at best lukewarm because the Court quickly described the *Aspen Skiing* holding as “at or near the outer boundary of § 2 liability.”¹⁰¹

As discussed above,¹⁰² the Court found that *Aspen Skiing* did not apply on the record before the Court and concluded that Verizon had not violated § 2.¹⁰³ Yet, the Court chose to pass on the task of articulating a bright-line rule for determining the legality of non-price based exclusionary conduct by a monopolist.¹⁰⁴ Several such bright-line standards have been proposed, including (1) the profit sacrifice test; (2) the “but-for” test; (3) the “equally efficient rival” standard; (4) the disproportionality standard; and (5) the balancing test.¹⁰⁵

a. The Profit Sacrifice Test

The profit sacrifice test is simply an extension of the predatory pricing standard enunciated in *Brooke Group*¹⁰⁶ to cases involving non-price predation. Under this standard, a plaintiff must establish that defendant engaged in exclusionary conduct,

97. *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 224 (1993). See Gavil, *supra* note 95, at 14-15.

98. *Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004) (citing *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919)).

99. *Colgate*, 250 U.S. at 307.

100. *Trinko*, 540 U.S. at 408 (citing *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 601 (1985)).

101. *Id.* at 409.

102. See *supra* notes 58-63 and accompanying text.

103. *Trinko*, 540 U.S. at 409-411.

104. Nevertheless, some scholars are of the view that *Trinko* adopts a profit sacrifice test for all § 2 violations. See Marina Lao, *Aspen Skiing and Trinko: Antitrust Intent and “Sacrifice,”* 73 ANTITRUST L.J. 171, 173 (2005). But see Eleanor M. Fox, *Is There Life in Aspen After Trinko: The Silent Revolution of Section 2 of the Sherman Act*, 73 ANTITRUST L.J. 153, 161 (2005) (the profit sacrifice test does not fit the facts of *Trinko* because “there were no profits to be made from giving access to the rivals”).

105. Gavil, *supra* note 95, at 52-65.

106. *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993).

giving up short-term profits, which would be recouped through the exercise of long-term monopoly power.¹⁰⁷ While this test has support among academics,¹⁰⁸ it has been powerfully and convincingly criticized by others.¹⁰⁹ The Achilles heel of the profit sacrifice test is its implicit assumption that for exclusionary behavior to violate § 2, it must impose some cost on the monopolist and hence be unprofitable in the short-term. This is manifestly not the case. For example, in monopoly maintenance cases, such as *Trinko*, the alleged monopolist makes no profit sacrifice because the exclusionary acts make the monopolist's conduct profitable at every point in time.¹¹⁰ Moreover, some non-price exclusionary practices, including exclusive dealing and tying arrangements, exclude rivals at virtually no cost and may be profitable immediately.¹¹¹ At the same time, the profit sacrifice test may produce some false positives by condemning conduct that is not unlawful. For example, product innovation is typically costly and requires "sacrifice" of profits in the near term.¹¹² If the new product is successful, then rivals are excluded because consumers will have substituted the new product for the old. A profit sacrifice test would not distinguish between competitive and anti-competitive innovation and therefore would condemn virtually all innovation.¹¹³

b. "No Economic Sense" Test

Under the "no economic sense" test, championed, at least initially, by the government in *Trinko*, exclusionary conduct is unlawful "if the conduct would not make economic sense for the defendant but for its elimination or softening of competition."¹¹⁴ Conversely, exclusionary conduct would be lawful if undertaken for legitimate business purposes. The "no economic sense" test would radically alter the focus of monopolization inquiries away from the traditional examination to the nature of the defendant's conduct toward the benefits, i.e., efficiencies resulting from the monopolistic behavior.¹¹⁵ In theory at least, a monopolist's conduct would be upheld under this standard if any efficiency gains can be established without the necessity of

107. See Gavil, *supra* note 95, at 55-58.

108. See, e.g., Patterson, *supra* note 95, at 37.

109. See Elhauge, *supra* note 95, at 253; Hovenkamp, *supra* note 95, at 147.

110. Gregory J. Werden, Panel Discussion at 7, *Hitting the Antitrust "Refresh" Button for In-House Counsel Following Trinko*, THE ANTITRUST SOURCE, July 2004, <http://www.abanet.org/antitrust/sourceJuly04-Teleconf7=23.pdf>.

111. See Hovenkamp, *supra* note 95, at 153-57.

112. See, e.g., Gregory J. Werden, *Identifying Exclusionary Conduct Under Section 2: The "No Economic Sense" Test*, 73 ANTITRUST L.J. 413-24 (2006) ("A short-term profit sacrifice obviously is insufficient to make conduct exclusionary because much procompetitive conduct entails the sacrifice of current profit in pursuit of greater profit over the longer term."); R. Hewitt Pate, Testimony before the Antitrust Modernization Commission Hearing Panel: Exclusionary Conduct: Refusals to Deal and Bundling and Loyalty Discounts (Sept. 29, 2005) ("Businesses often surrender short-term profits for investments that promise greater future profits, and they do so for reasons that make business sense independent of any reduction in competition."); Gavil, *supra*, note 95, at 55-58; Elhauge, *supra* note 95, at 274-79.

113. Gavil, *supra* note 95, at 3-5.

114. Brief for the United States and the Federal Trade Commission as Amici Curiae Supporting Petitioner at 10, *Trinko*, 540 U.S. 398 (2004) (No. 02-682); see also Werden, *supra* note 110, at 7.

115. See Gavil, *supra* note 95, at 52-54.

balancing those benefits against any anticompetitive effects.¹¹⁶ For this reason, the “no economic sense” standard has been viewed by critics as overly permissive.¹¹⁷ Proponents, on the other hand, have mounted a vigorous defense of the “no economic sense” standard.¹¹⁸ While recognizing that the test “does not purport to condemn all conduct that might create market power or reduce economic welfare,”¹¹⁹ they argue that in the “real world,” judges and juries cannot accurately determine whether the procompetitive aspects of business conduct outweigh the anticompetitive aspects.¹²⁰ The “no economic sense” test provides a standard that can be administered by the courts without deterring procompetitive behaviors.¹²¹

c. Equally Efficient Rival Standard

Judge Richard Posner has taken the view that conduct is unlawfully exclusionary where it “is likely in the circumstances to exclude from the defendant’s market an equally or more efficient competitor.”¹²² Judge Posner’s test works well in cases involving price predation because it assures that a lower cost seller can charge lower prices than its higher cost rivals without fear of antitrust sanction.¹²³ Outside the area of predatory pricing, however, the Posner test is vulnerable to criticism. Professor Hovenkamp points out that in certain circumstances the Posner definition of exclusionary conduct “seems unreasonably lenient and even perverse.”¹²⁴ For example,

116. *Id.* at 52-53.

117. *Id.* at 53-55; see also Steven C. Salop, *Exclusionary Conduct, Effect on Consumers, and the Flawed Profit-Sacrifice Standard*, 73 ANTITRUST L.J. 311, 354-46 (2006).

118. See Werden, *supra* note 112, at 413-33; Pate, *supra* note 112, at 8-12; A. Douglas Melamed, *Exclusionary Conduct Under the Antitrust Laws: Balancing, Sacrifice, and Refusals to Deal*, 20 BERKELEY TECH. L.J. 1247, 1256-67 (2005).

119. Melamed, *supra* note 118, at 1258.

120. Werden contends,

Economic analysis in the courtroom tends to be both incomplete and far from state of the art, and more importantly, [the consumer welfare effects] test generally would be applied by juries that do not understand economics and probably do not care much what it has to say. Reliance on the jury system assures that the consumer welfare test would result in high incidence of false positive findings of exclusionary conduct.

See Werden, *supra* note 112, at 432. R. Hewitt Pate also has stated:

But while the [“no economic sense”] test will lead to some false negatives, this criticism has more purchase in the seminar room than in the real world. Because promotion of consumer welfare is the goal of the antitrust laws, the perfect test in theory would of course be one that consistently and accurately condemned *all*, but *only*, that conduct which leads to a net decrease in economic welfare. No such test exists in the real world where businesses must risk capital and make practical decisions. Although one can command a judge or jury to consider all relevant circumstances and decide whether the pro-competitive aspects of certain conduct outweigh the anti-competitive aspects of that conduct, this does not mean that the judge or jury can do so accurately. In fact, there is no guarantee that people who do this sort of thing for a living can do so accurately.

Pate, *supra* note 112, at 8-9 (footnotes omitted).

121. Werden, *supra* note 112, at 432-33.

122. RICHARD A. POSNER, ANTITRUST LAW 194-95 (2d ed. 2001).

123. Hovenkamp, *supra* note 95, at 153-54.

124. *Id.* at 154.

where a monopolist brings a baseless patent infringement claim against an equally efficient rival in order to deter entry, that rival is likely to defend successfully on the merits and hence would not be deterred from entry.¹²⁵ However, where that same suit is brought against a less efficient rival whose ability to bear litigation costs is questionable, the monopolist may well be able to deter entry.¹²⁶ In this situation, the means to exclude—the filing of a baseless infringement suit—is “socially useless,”¹²⁷ and the courts “should not condone useless conduct simply because a hypothetical equally efficient rival would not be excluded.”¹²⁸

Professor Gavil has also criticized the Posner formulation, noting the practical difficulties of implementing an efficiency standard, given that measuring comparative efficiencies is a “tricky business.”¹²⁹ Professor Gavil further observes that the Posner test is unfair to plaintiffs, who, at the pleadings stage, would typically lack information sufficient to allege that they were “equally efficient” as the defendant.¹³⁰

d. Disproportionality

Professors Areeda and Hovenkamp have defined exclusionary conduct under § 2 as acts that:

- (1) are reasonably capable of creating, enlarging or prolonging monopoly power by impairing the opportunities of rivals; and (2) that either (2a) do not benefit consumers at all, or (2b) are unnecessary for the particular consumer benefits that the acts produce, or (2c) produce harms disproportionate to the resulting benefits.¹³¹

This test is more in line with traditional monopolization analysis in that unlike the “no economic sense” test outlined above,¹³² the discussion begins with an examination of defendant’s market power and the anticompetitive effects of its conduct.¹³³ The analysis then focuses on the effect of defendant’s conduct on consumers. First, if the conduct has no benefits for consumers, it can be summarily condemned.¹³⁴ Second, if the anticompetitive conduct is not necessary to achieve the alleged consumer benefits, the conduct can be similarly condemned.¹³⁵ Third, where the conduct causes harm that is necessary to achieve benefits, the court must undertake a balancing process.¹³⁶ Disproportionality connotes not merely that the harm outweighs the good, but rather that the harm outweighs the good *significantly*.¹³⁷ The precise mechanism for weighing

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.* at 155.

129. Gavil, *supra* note 95, at 59.

130. *Id.* at 60.

131. Hovenkamp, *supra* note 95, at 148 (quoting PHILLIP AREEDA & HERBERT HOVENKAMP, 3 ANTITRUST LAW ¶ 651a, 72 (2d ed. 2002)).

132. See *supra* notes 114–121 and accompanying text.

133. Gavil, *supra* note 95, at 62.

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

is not clear, but it would appear that under a disproportionality standard, any doubts would be resolved in favor of the monopolist.¹³⁸

e. Balancing—The Microsoft Approach

A fifth source of guidance for rules on exclusionary conduct comes from the D.C. Circuit's opinion in *Microsoft*.¹³⁹ In that case, the court of appeals articulated an analytical framework applicable to all § 2 cases: (a) the plaintiff must establish that the monopolist engaged in conduct having an anticompetitive effect; (b) the plaintiff must also establish antitrust injury, that is, harm to the competitive process and not simply harm to a particular competitor; (c) once plaintiff has established anticompetitive effect and antitrust injury, the monopolist may come forward with procompetitive justifications for its conduct; (d) if the monopolist fails to come forward with justification for its acts, leaving the plaintiff's claims un rebutted, it is liable under § 2; (e) if the monopolist asserts a procompetitive justification, the burden is on the plaintiff to prove that, on balance, the anticompetitive effects of the conduct outweigh the procompetitive benefits.¹⁴⁰

The balancing approach may be criticized for its uncertainty and lack of predictability; but proponents argue that unlike the simplified single-factored tests discussed above,¹⁴¹ "at least [the balancing test] takes all relevant factors into account."¹⁴² Supporting the balancing approach, Professor Pitofsky argues that:

There are at least two other important reasons for preferring a balancing test over one that focuses upon a single factor. Behavior that justifiably should be found to violate the conduct element of Section 2 can vary across a broad range. I doubt that the very same test should be applied to predatory pricing, vertical restrictions, or refusals to deal, given the different prospects that such behavior would help or hurt consumers. It seems likely to me that the test or tests that eventually are adopted will vary among these different forms of behavior. A balancing test allows enforcement officials or courts to take into account the respective weights of anticompetitive effects as opposed to redeeming efficiencies. A second reason to prefer the balancing test is that the other proposed tests—including the "no economic sense" or "profit sacrifice" standard—focus on the impact upon the party engaging in the allegedly anticompetitive behavior. But antitrust is supposed to focus on the welfare of consumers.¹⁴³

Single factor tests, on the other hand, with their focus on the monopolist rather than on consumer welfare and their implicit suggestion that courts are not up to the task of balancing are a frontal attack on the rule of reason which historically has guided analysis under the Sherman Act.¹⁴⁴

138. *Id.*

139. *United States v. Microsoft Corp.*, 253 F.3d 34, 64-67 (D.C. Cir. 2001).

140. *Id.*

141. See, *supra* notes 106-40 and accompanying text.

142. See Pitofsky Testimony, *supra* note 18, at 5.

143. *Id.*

144. *Id.* at 5-6. In his testimony, Professor Pitofsky criticized single factor tests:

Finally, let me touch upon several of the reasons that have been advanced in favor of a simplified or single factor test. First, it has been suggested that more lenient enforcement

The "balancing" approach is less stringent for plaintiffs than the disproportionality standard discussed above. Plaintiffs would have to show simply that anticompetitive effects outweigh procompetitive benefits; whereas under the disproportionality standard, plaintiffs would face the added burden of showing not only that the anticompetitive harm outweighed the benefits, but also that the harm suffered was disproportional to the efficiencies gained.¹⁴⁵

The question of when non-price exclusionary behavior by a monopolist is unlawful is complex. The Court in *Trinko* chose not to articulate a bright-line rule. The closest the Court in *Trinko* came to endorsing any test was in its discussion of *Aspen Skiing* in which it stated that the defendant's termination of a voluntary, profitable arrangement suggested a willingness to trade short-term profits for long-term market price. The Court stated: "The unilateral termination of a voluntary (*and thus presumably profitable*) course of dealing suggested a willingness to forsake short-term profits to achieve an anticompetitive end. Similarly, the defendant's unwillingness to renew the ticket *even if compensated at retail price* revealed a distinctly anticompetitive bent."¹⁴⁶

A fair reading of the Court's language is that profit sacrifice may be a *sufficient* condition of non-price exclusionary behavior; nowhere does the court say that it is a *necessary* condition.¹⁴⁷ In saying so little, the Court passed up a golden opportunity to clarify the law relating to exclusionary behavior by a monopolist.

III. THEMES OF *TRINKO*

The significance of *Trinko* lies not in its doctrinal pronouncements but rather in its rhetoric. Justice Scalia articulated what Professor Andrew Gavil has termed the antitrust "counter-narrative" with respect to monopolization.¹⁴⁸ A counter-narrative as the term implies, is a restatement of antitrust principles that is at odds with the traditional antitrust narrative.¹⁴⁹ In the area of monopolization, the traditional antitrust narrative cautions the courts to be vigilant in assessing the behavior of dominant firms.¹⁵⁰ Indeed, courts have been suspicious of monopolistic behavior out of concern

under Section 2 makes sense (i.e., fewer false positives) because in the end monopoly prices will invite new entry, and the innovation and other consumer advantages introduced by monopolists will contribute to consumer welfare. I regard that as a direct challenge to the fundamental insight of Section 2 which is that unreasonably exclusionary behavior by monopolists undermines the incentives of the victim of the exclusion and often its ability to compete on the merits, and may even undermine incentives of the monopolists to compete in procompetitive ways. The point is fairly clear in the legislative history of Section 2 and all but the most recent scholarship and case law. Another suggestion is that the balancing approach is too complicated to be imposed by judges of limited competence. That is a challenge to a broad range of antitrust enforcement including rule of reason balancing under Section 1 and merger analysis under Section 7. Unless we are to move to a system where there is nothing but *per se* legal and *per se* illegal categorizing, balancing efforts under some form of rule of reason are unavoidable. *Id.* (footnotes omitted)

145. Gavil, *supra* note 95, at 61-64.

146. *Trinko*, 540 U.S. at 409.

147. See Gavil, *supra* note 95, at 42-51.

148. *Id.* at 34.

149. *Id.*

150. *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 427 (2d Cir. 1945).

that the exercise of uncabined economic power would chill the vigor of competition and deaden initiatives to innovate, which in turn would lead to higher prices, lower quality of goods, and less consumer choice.¹⁵¹ Justice Scalia's counter-narrative contains three significant themes: (1) a more tolerant approach to the behavior of dominant firms, (2) guerilla warfare on certain § 2 doctrines, and (3) a minimalist role for the courts in monopolization cases.

A. Tolerance of Monopolistic Behavior

The Court's counter-narrative espouses a kinder, gentler approach to monopolists and monopolistic behavior. Traditional analysis in § 2 cases begins with an appraisal of market structure and the conduct of the monopolist in the relevant market.¹⁵² The counter-narrative focuses not on the anticompetitive effects flowing from the monopolist's conduct, but rather the benefits of the monopolist's behavior.¹⁵³ Thus, in *Trinko*, far from being suspicious of dominant firms, the Court describes monopoly power as "an important element of the free-market system."¹⁵⁴ The Court further notes that "[t]he opportunity to charge monopoly prices—at least for a short period—is what attracts 'business acumen' in the first place."¹⁵⁵

Only after underscoring the benefits of monopoly does the Court consider anticompetitive effects caused by the dominant firm's conduct. In assessing Verizon's alleged refusal to deal with AT&T, the Court notes the long-accepted general rule under *Colgate*¹⁵⁶ that a trader is free to choose its own customers.¹⁵⁷ The Court further notes that forcing a monopolist to deal with a rival may create significant disincentives for the monopolist to invest in "economically beneficial facilities."¹⁵⁸ Finally, the Court questions the ability of the Court system to administer forced sharing orders and to remedy violations of such orders.¹⁵⁹ It also expresses concern that forced sharing could foster collusion among rivals—"the supreme evil of antitrust."¹⁶⁰

Under the counter-narrative, the monopolist is an upstanding citizen of the community, not some shady character in need of constant surveillance.

B. Guerilla War on Section 2

A second theme of *Trinko* is the orchestration of guerilla war on three conduct-specific doctrines of monopolization law: (1) essential facilities, (2) leveraging, and (3) *Aspen Skiing*. The expansiveness of the Court's language in *Trinko* has rankled antitrust scholars. Professor Eleanor Fox has taken the Court to task, stating that

151. *Id.*

152. *Id.* at 424-25.

153. *Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, UP*, 540 U.S. 398, 407 (2004).

154. *Id.*

155. *Id.*

156. 250 U.S. 300, 307 (1919).

157. *Trinko*, 540 U.S. at 408.

158. *Id.* at 407-08.

159. *Id.*

160. *Id.*

"*Trinko* is a child in a china shop of Section 2."¹⁶¹ She decries the Court's preference for "business freedom" over "competition and competitive opportunity."¹⁶² Professor Fox also argues that *Trinko* takes dead aim at well-accepted principles of § 2 jurisprudence:

[*Trinko*] overrules *Berkey v. Kodak* (monopoly leveraging is illegal) in a brief footnote. For those who accept Judge Posner's interpretation of *Aspen Skiing* (competitor's right of access to an essential facility), it overrules *Aspen Skiing*. For those who accept the facts of *Otter Tail* (failure to supply wholesale power to municipalities that hoped to serve Otter Tail's retail customers), it makes clear its preference for Justice Stewart's dissent.¹⁶³

In a similar vein, Professor Thomas Kauper, former head of the Antitrust Division, has questioned, "whether the 1974 complaint in the AT&T case would be sustainable under *Trinko*."¹⁶⁴

1. Essential Facilities

Under the essential facilities doctrine, a monopolist may be required to deal with a rival where (1) forced dealing is feasible; (2) the product developed by the monopolist is so superior that it is "essential" for rivals to have in order to compete; (3) the monopolist has denied the rival use of the facility; and (4) the facility, as a practical matter, cannot be duplicated by the rival.¹⁶⁵ Every court at the circuit level has recognized this doctrine.¹⁶⁶ The Supreme Court has never had occasion to pass on the essential facilities doctrine,¹⁶⁷ although it has on several occasions required monopolists to deal with rivals.¹⁶⁸

In *Trinko*, the Court correctly stated that the essential facilities doctrine was not an issue because the Telecommunications Act of 1996 mandated Verizon to grant rivals access to its facilities.¹⁶⁹ The Court might have stopped there, but instead chose to prolong its discussion by going out of its way to point out that it has never embraced the essential facilities doctrine and by citing an article by Professor Areeda critical of that doctrine.¹⁷⁰ At the very least, the opinion in *Trinko* raises doubt as to whether

161. Eleanor M. Fox, Walter J. Derenberg Professor of Trade Regulation at N.Y. Univ. Sch. of Law, *The Trouble with Trinko*, Address to the 52nd Annual ABA Antitrust Section Spring Meeting 4 (Mar. 31, 2004).

162. *Id.* at 3.

163. *Id.* at 4 (footnotes omitted).

164. Thomas E. Kauper, *Section Two of the Sherman Act: The Search for Standards*, 93 GEO. L.J. 1623, 1639-40 (2005).

165. *MCI Commc'ns Corp. v. AT&T Corp.*, 708 F.2d 1081, 1132-33 (7th Cir. 1983); see generally ABA SECTION OF ANTITRUST LAW, 2002 ANNUAL REVIEW OF ANTITRUST LAW DEVELOPMENTS 62-63 (2003) [hereinafter ALD V].

166. Elhauge, *supra* note 95, at 261 n.20 (citing cases).

167. *Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 411 (2004) (citing *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 611 n.44 (1985); *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 428 (1999)).

168. See, e.g., *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451 (1992); *Aspen Skiing*, 472 U.S. 585; *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973).

169. *Trinko*, 540 U.S. at 410-11.

170. *Id.* at 411.

essential facilities provides a legal basis upon which to proceed against a monopolist, independent of a more general claim of monopolistic refusal to deal.

2. Leveraging

Leveraging is the use of monopoly power in one market to obtain monopoly power in another market.¹⁷¹ Leveraging as a basis of liability under § 2 has been criticized by lower courts.¹⁷² Nevertheless, the Supreme Court in *Griffith* and again in *Kodak* has recognized leveraging as a species of monopolization. In a footnote, the Court in *Trinko* gives leveraging the cruel back of the hand, suggesting that leveraging is not a theory of antitrust liability independent of attempted monopolization under § 2.¹⁷³

3. Aspen Skiing

Aspen Skiing involved a joint venture gone awry. Plaintiff, operator of one skiing facility in Aspen, brought an action under § 2 against defendant, who owned and operated the other three ski facilities in Aspen.¹⁷⁴ For years the parties had cooperated in issuing an all-area ski ticket, which permitted skiers to buy one ticket and ski at any mountain in Aspen.¹⁷⁵ The arrangement worked well at first; but over time, defendant demanded a larger and larger share of revenues until the arrangement was no longer financially feasible for plaintiff.¹⁷⁶

Defendant then began marketing its own all-area pass to its three mountains.¹⁷⁷ Plaintiff then tried a variety of ways to re-create the four mountain pass and even offered to pay defendant full retail price for access to its mountains under plaintiff's all area pass; but defendant refused to cooperate.¹⁷⁸ Plaintiff then sued under § 2, alleging a monopolistic refusal to deal.¹⁷⁹ The Supreme Court upheld plaintiff's claim, concluding that by withdrawing from a long-standing and profitable joint marketing arrangement, and thereby impairing its rival's ability to attract customers, defendant reduced competition in Aspen skiing over the long run.¹⁸⁰ In so ruling, the Court identified four key factors that supported its condemnation of defendant's refusal to deal under § 2 of the Sherman Act: (1) defendant had terminated a voluntary and presumably profitable relationship, thereby giving up short term profits in order to drive a rival from the field; (2) defendant had refused to deal with plaintiff, even at full retail price; (3) defendant had proffered no legitimate business justification for its conduct; and (4) as a result of defendant's acts, competition had been diminished because consumer choice had been limited.¹⁸¹

171. See *ALD V*, *supra* note 165, at 64; *Kodak*, 504 U.S. at 482-83; *United States v. Griffith*, 334 U.S. 100, 108 (1948).

172. See, e.g. *Alaska Airlines, Inc. v. United States*, 948 F.2d 536 (9th Cir. 1991).

173. *Trinko*, 540 U.S. at 415, n.4.

174. 472 U.S. 472, 589-90 (1985).

175. *Id.*

176. *Id.* at 592.

177. *Id.* at 593.

178. *Id.* at 593-94.

179. *Id.* at 595.

180. *Id.* 605-11.

181. *Id.*

The Court in *Trinko* distinguished *Aspen Skiing* pointing out that (1) unlike the defendant in *Aspen Skiing*, Verizon had not engaged in a voluntary course of dealing with rivals; (2) but for the Telecommunications Act, Verizon would not have dealt with rivals at all; (3) accordingly, unlike the case in *Aspen Skiing*, prior course of dealing sheds no light on Verizon's motives for not dealing with AT&T; (4) whereas defendant in *Aspen Skiing* declined to sell to its rivals at retail, Verizon preferred to sell at retail rather than selling to rivals at wholesale on a cost-based formula; and (5) while in *Aspen Skiing* the product in question was already being sold by the defendant at retail to the public, the services in question in *Trinko* were not available to the public.¹⁸²

Again, the Court could have stopped there without kicking dirt on the holding in *Aspen Skiing*. However, the Court went on to isolate *Aspen Skiing*, describing its holding as "at or near the outer boundary of § 2 liability."¹⁸³ A fair reading of this language is that cases like *Aspen Skiing* are rare and that its applicability should be limited to its particular facts. This is good news for dominant firms that have been repeatedly denied summary judgment in refusal to deal cases on the grounds that, after *Aspen Skiing*, whether there is a business justification for the refusal to deal is a question of fact.¹⁸⁴

C. Redefined—And More Limited—Role For The Courts

A third theme of *Trinko* is its advocacy of a more minimalist role for courts in antitrust cases. As a threshold matter, the Court cautions that any antitrust intervention by the judiciary must take account of the degree of regulation in an industry.¹⁸⁵ The greater the regulatory overlay, the less appropriate the use of antitrust interdiction.¹⁸⁶ The Court reasoned that in certain cases "regulation significantly diminishes the likelihood of major antitrust harm."¹⁸⁷ Specifically, the Court noted that Verizon had been subject to pervasive oversight by state and federal regulators and that the regulatory scheme was employed swiftly and effectively to rectify Verizon's breach of sharing duties.¹⁸⁸

Accordingly, the Court viewed the benefits of antitrust intervention as "slight" when weighed against a "realistic assessment of its costs."¹⁸⁹ First, the Court pointed out the high costs of false positives.¹⁹⁰ It noted that even under the best of circumstances, the application of monopolization law "can be difficult"¹⁹¹ and that mistaken inferences of anticompetitive effect "are especially costly, because they chill the very conduct the antitrust laws are designed to protect."¹⁹² For example, Verizon's

182. *Trinko*, 540 U.S. 398, 408-10 (2004). But for the Telecommunications Act, Verizon would not have dealt with rivals at all. *Id.*

183. *Id.* at 409.

184. *Id.*

185. *Id.* at 412.

186. *Id.*

187. *Id.* (quoting *Concord v. Boston Edison Co.*, 915 F.2d 17, 25 (1st Cir. 1990)).

188. *Id.* at 411-13.

189. *Id.* at 414.

190. *Id.*

191. *Id.* (quoting *United States v. Microsoft Corp.*, 253 F.3d 34, 58 (D.C. Cir. 2001)).

192. *Id.* (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1986)).

failure to provide prompt service to AT&T may have had no connection to any attempted anticompetitive exclusion by Verizon.¹⁹³

Second, allegations of failure to comply with sharing requirements may be difficult for an antitrust court to evaluate “not only because they are highly technical, but also because they are likely to be extremely numerous, given the incessant, complex, and constantly changing interaction” of the parties.¹⁹⁴ Identifying the means of anticompetitive exclusion would prove a “daunting task” for “generalist” antitrust courts¹⁹⁵ and is better left to state and federal regulators.

Third, antitrust intervention in regulated fields would inevitably lead to costly “interminable litigation.”¹⁹⁶ Antitrust intervention is also likely to lead to duplicative enforcement and liability.¹⁹⁷

Fourth, courts are ill-equipped to engage in the day-to-day supervision of the implementation of “a highly detailed decree.”¹⁹⁸ Again, that task is better left to administrative agencies rather than the courts.¹⁹⁹

Fifth, even where a court finds that costs of enforcement do not outweigh the benefits of antitrust intervention, the Court urges self-restraint, concluding that the Sherman Act “does not give judges *carte blanche* to insist that a monopolist alter its way of doing business whenever some other approach might yield greater competition.”²⁰⁰

Closely related to the concern about the high costs of antitrust intervention is the concern about inherent limitations on federal judges in evaluating complicated evidence and in supervising complex decrees. Simply put, the Court in *Trinko* suggests that, at least in some cases, federal judges are simply not up to the task of evaluating exclusionary conduct by dominant firms. The Court’s language is reminiscent of Justice Marshall’s cautionary words in *Topco* over thirty years ago that in enacting the antitrust laws, Congress did not intend to leave federal judges “free to ramble through the wilds of economic theory.”²⁰¹ However, the view that courts are of limited utility in evaluating complicated evidence soon gave way to an opposing, and now prevailing view, as exemplified in *Sylvania*²⁰² and *Brunswick*,²⁰³ that economics can be a very effective tool for informing antitrust decisions. Yet, to read the admonitions of the *Trinko* Court, it is almost as if a generation of case law in which courts have demonstrated an even stronger grasp of economic principles as well as sophistication in their application, is being tossed aside.

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.* at 414-15.

199. *Id.*

200. *Id.* at 415-16.

201. *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 609-10, n.10 (1972).

202. *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977).

203. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977).

IV. IS ANYONE LISTENING? THE LOWER COURTS POST-*TRINKO*

Trinko was only one of many cases which, following the passage of the Telecommunications Act of 1996, had been percolating through the courts and had explored the relationship between that Act and the antitrust laws.²⁰⁴ Not surprisingly, all of the cases have looked to *Trinko* for guidance. What is surprising, however, is that the lower courts have not been uniform in their application of *Trinko* principles; and some antitrust claims, even telecommunications cases with facts very similar to those in *Trinko*, have survived motions to dismiss or motions for summary judgment.

This is not to suggest that *Trinko* has not been beneficial to defendants. For example, in *Greco v. Verizon Communications, Inc.*,²⁰⁵ Judge Wood granted defendant's motion to dismiss in an opinion that is virtually a verbatim recapitulation of *Trinko*. Plaintiff had sought to purchase high-speed internet access, termed Digital Subscriber Line (DSL) service, from Verizon but was denied because he purchased his local phone service from a Verizon rival.²⁰⁶ Verizon sold DSL as part of a bundle of services to its local phone service customers.²⁰⁷ Plaintiff sued Verizon, alleging, *inter alia*, that Verizon's DSL policies constituted unlawful tying and monopolistic refusal to deal. Verizon moved to dismiss.²⁰⁸

In analyzing plaintiff's monopolization claim, Judge Wood opined that *Trinko* required an examination of four factors: (1) whether the cost of antitrust intervention outweighs the benefit; (2) whether the relief sought would require the courts to act as "central planners"; (3) whether any decision would involve "continuing supervision of a highly detailed decree"; and (4) whether a regulatory structure exists to deter and remedy anticompetitive harm.²⁰⁹

As a threshold matter, the court found *Trinko* principles apply equally to cases where the plaintiff is a customer rather than a competitor.²¹⁰ Turning to the merits, the court found that in any efforts to determine the "but for" price, this court would have to answer the same cost-related and market-force questions that the *Trinko* Court held are not suitable for courts to answer.²¹¹ The court further reasoned that the first three *Trinko* factors point strongly towards dismissal.²¹² The court's analysis of the *Trinko* factors was:

- (1) [T]he costs of antitrust intervention here would outweigh the benefits, because intervention runs a substantial risk of skewing investment incentives: the constantly changing competitive landscape makes it very difficult for a court to set a reasonable price for services, which requires consideration of, *inter alia*, what return on investment will maximize beneficial investment in new technologies;
- (2) identifying and remedying the alleged wrongs here would require this Court to act as a "central planner." In deciding whether Defendants are making DSL service

204. See, e.g., *Covad Commc'ns Co. v. Bell Atlantic Corp.*, 398 F.3d 666 (D.C. Cir. 2005); *Covad Commc'ns Co. v. BellSouth Corp.* 374 F.3d 1044 (11th Cir. 2004).

205. 2005 WL 659200 at *1 (S.D.N.Y. 2005).

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.* at *3.

210. *Id.*

211. *Id.* at *4.

212. *Id.* at *4-5.

available to consumers on reasonable terms and in time, what is the optimal configuration of services and prices to promote competition, while incentivizing all carriers to innovate;

(3) remediation here would require “continuing supervision of a highly detailed decree.” Continuing supervision would be needed for the Court to decide on an ongoing basis, whether any change(s) in the competitive landscape change the reasonableness of the terms and conditions of sale the Court approved. The decree’s high level of detail would result, in part, from complexity of the accounting and other pricing factors the Court would be required to consider.²¹³

Having disposed of the monopolization claim on the merits, the court held that in any event, the plaintiff lacked standing to pursue that claim because the complicated analysis of market forces that the court would have to undertake to determine any damages left it “ill-suited to redress the alleged injuries.”²¹⁴ The court further ruled that for the same reasons, plaintiff lacked standing to assert his tying claim against the defendant.²¹⁵

The *Greco* decision stands as a virtual carbon copy of *Trinko*. Although, unlike the Supreme Court in *Trinko*, the court in *Greco* acknowledged the procedural standards governing a motion to dismiss,²¹⁶ The *Greco* Court proceeded to disregard those standards by assuming “facts” about the nature of the marketplace that were not part of the record before the court.²¹⁷

Relying on *Trinko*, in *MetroNet Services Corp. v. Qwest Corp.*,²¹⁸ the Ninth Circuit upheld summary judgment dismissing a monopolization claim against a local telephone exchange provider by a reseller of telecommunications services.²¹⁹ Qwest offered volume discounts on phone services to businesses having more than twenty phone lines.²²⁰ MetroNet purchased Qwest services at the discounted rate and resold the services to businesses with fewer than twenty lines.²²¹ Because Qwest was losing significant revenues to MetroNet and other resellers, it proceeded to change its pricing structure and discount policies to eliminate resale of its services by arbitrageurs.²²²

MetroNet then sued alleging (1) it had been denied access to an essential facility, and (2) Qwest’s change in pricing policies to eliminate arbitrage constituted unlawful exclusionary conduct by a monopolist.²²³ Relying on *Trinko*, the court made short-shrift of the essential facilities claim.²²⁴ The court ruled that the indispensable element of the essential facilities doctrine—lack of access to the facility in question—could not be established because regulatory authorities in the state of Washington had power to

213. *Id.* (quoting *Trinko*, 540 U.S. 398, 415 (2004)).

214. *Id.*

215. *Id.* at 5.

216. *Id.* at 2.

217. *Id.* at 4-5.

218. 383 F.3d 1124 (9th Cir. 2004).

219. *Id.* at 1126.

220. *Id.* at 1127.

221. *Id.*

222. *Id.*

223. *Id.* at 1126.

224. *Id.* at 1128-30.

compel access to Qwest facilities.²²⁵ Plaintiff's real complaint was not denial of access, but rather denial of access on its terms.²²⁶ The court ruled that the essential facilities doctrine does not guarantee access at the most profitable rate.²²⁷

The court also ruled that Qwest's conduct was not unlawfully exclusionary under *Aspen Skiing*.²²⁸ Although acknowledging that Qwest had engaged in a course of dealing with the plaintiff, the court, nevertheless, distinguished *Aspen Skiing*, finding that unlike the defendant in *Aspen Skiing*, Qwest (1) was willing to, and did, sell at full retail prices; (2) did not refuse to sell to MetroNet but would sell only on the same terms as it sold to direct purchasing consumers; (3) did not forsake short-term profits but rather tried to augment short-term profits; and (4) did not sacrifice profits in the short run to exclude rivals in the long-run.²²⁹

Finally, the court concluded that the existing regulatory structure adequately protected consumers and that the cost of antitrust intervention in this case would significantly outweigh any benefits.²³⁰ Accordingly, to extend § 2 protections in an attempt to eliminate arbitrage would be contrary to the *Trinko* holding.²³¹

In *New York Mercantile Exchange, Inc. v. Intercontinental Exchange, Inc.*,²³² the court dismissed a monopolization claim in a matter arising outside the telecommunications field. The New York Mercantile Exchange (NYMEX) sued Intercontinental Exchange (ICE) for copyright and trademark infringement; and ICE counterclaimed alleging monopolization; claiming denial of access to an essential facility and unlawful exclusion under *Aspen Skiing*.²³³

The nub of the essential facilities claim was that in order to conduct certain trading activity ICE, a rival of NYMEX, needed access to settlement prices posted by NYMEX.²³⁴ Citing *Trinko*, the court rejected this claim out of hand because the Commodities Futures Trading Commission, the regulatory body governing futures trading, had the authority to compel access to NYMEX settlement prices.²³⁵

The court also rejected the claim of monopolistic exclusion based on *Aspen Skiing*, noting (1) the lack of any prior voluntary course of dealing between NYMEX and ICE, and (2) the lack of any alleged harm to consumer interest as a result of NYMEX's conduct.²³⁶ The court also found that NYMEX had a legitimate business

225. *Id.* at 1129; *see also* *Stein v. Pacific Bell*, 172 F. App'x 192, 194 (9th Cir. 2006) (holding no essential facility claim where access is mandated); *Marco Island Cable, Inc. v. Comcast Cablevision, Inc.*, 2006 WL 1814333, at *1, 8 (M.D. Fla. 2006) (holding that a company with a twenty percent share of the cable market does not have monopolistic power over an essential facility).

226. *MetroNet*, 383 F.3d at 1129-30.

227. *Id.* at 1130.

228. *Id.* at 1134.

229. *Id.* at 1131-34; *see also* *Dealer Computer Services, Inc. v. Ford Motor Co.* 2006 WL 801033, at *4-5 (S.D. Tex. Mar. 28, 2006) (in which the contract had expired, and no course of dealing had been established); *Abbott Laboratories v. Teva Pharm. USA, Inc.*, 432 F.Supp.2d 408 (D.Del. 2006) (stating that there is no general duty to aid rivals).

230. *MetroNet*, 383 F.3d at 1134.

231. *Id.* at 1137.

232. 323 F.Supp.2d 559 (S.D.N.Y. 2004).

233. *Id.* at 560-61.

234. *Id.* at 567-68.

235. *Id.* at 569.

236. *Id.* at 570-71.

purpose in excluding ICE, viz., ICE's free riding on NYMEX's settlement prices.²³⁷ Finally, the court, again relying on *Trinko*, found that ICE had failed to allege proof of a dangerous probability of successful monopolization of a second market and hence rejected ICE's leveraging claim.²³⁸

Other courts have been less expansive in construing *Trinko*. In *Covad Communications Co. v. Bell Atlantic Corp.*,²³⁹ plaintiff was a rival to defendant in the sale of DSL services and alleged, inter alia, that Bell Atlantic had violated § 2 by refusing to sell DSL services to those customers who had orders for DSL services with Covad in an effort "to prevent Covad from getting to the market ahead of Bell Atlantic."²⁴⁰ Defendant moved to dismiss on two grounds: first, Covad had failed to allege that Bell Atlantic had incurred a short-term economic loss by instigating this policy; and second, the practice was justified because it was unprofitable for Bell Atlantic to sell DSL services to a customer that would soon switch to Covad.²⁴¹

The court rejected both arguments. It held that by alleging that Bell Atlantic's conduct had been predatory, Covad had sufficiently alleged short-term profit sacrifice in order to drive a rival from the field.²⁴² In addition, the court held that Bell Atlantic's business justification defense raised factual issues not cognizable on a motion to dismiss. In so holding, the court acknowledged that Bell Atlantic's conduct may ultimately be found to have been a reasonable business decision.²⁴³ However, plaintiff's allegation that the conduct was unlawfully exclusionary was equally plausible; and the factual dispute would have to be resolved at trial.²⁴⁴

On the other hand, the court in *Covad* rejected the claim that Bell Atlantic's alleged refusal to cooperate with Covad made out a § 2 claim.²⁴⁵ Relying on *Trinko*, the court observed that there was no evidence of any course of dealing between the parties nor any evidence that there would have been dealing absent statutory compulsion.²⁴⁶ Similarly, the court rejected Covad's allegations of a price squeeze, i.e., that "Bell Atlantic charged Covad a prohibitively high and discriminating price for access to its loops."²⁴⁷ The court found that there can be no liability for a price squeeze if the monopolist was, as here, free not to deal in the first place.²⁴⁸

The approach of the D.C. Circuit in *Covad* differs from the approach of the Supreme Court in *Trinko* in two significant ways. First, in *Covad*, the court accepted all allegations and reasonable inferences therefrom as true. Second, the court in *Covad* refused to draw legal conclusions from a disputed factual record on a motion to dismiss.

237. *Id.* at 571. In determining that there was a valid business justification, the court went beyond the complaint and relied on statements made during oral argument. *Id.*

238. *Id.* at 572.

239. 398 F.3d 666 (D.C. Cir. 2005).

240. *Id.* at 675.

241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.* at 676.

245. *Id.* at 663.

246. *Id.*

247. *Id.*

248. *Id.*

In contrast to the D.C. Circuit, the Eleventh Circuit in *Covad Communications Co. v. BellSouth Corporation* (*BellSouth*) rejected plaintiff's claim based on *Aspen Skiing*.²⁴⁹ The *BellSouth* Court ruled that "*Trinko* now effectively makes the unilateral termination of a voluntary course of dealing a requirement for a valid refusal-to-deal claim under *Aspen*."²⁵⁰ Because the Telecommunications Act mandated that BellSouth allow Covad access to its facilities, the relationship between BellSouth and Covad was not voluntary.²⁵¹ As there was no unavailability of access, the court also rejected Covad's essential facilities claim.²⁵²

Nevertheless, the Eleventh Circuit refused to dismiss the complaint and upheld Covad's price squeeze claim. Covad first alleged that:

If BellSouth had charged itself the same wholesale price for loops, BellSouth could not make a profit from its DSL service at current prices BellSouth achieves the unlawful price squeeze by allocating costs so as to apportion only a *de minimis* cost to the loops over which it provides its own DSL service As the costs are presently allocated, BellSouth must necessarily realize a significantly higher profit margin on its wholesale sales (for which it faces no competition) than it does on the corresponding retail sales (for which Covad is attempting to compete). BellSouth intended this artificial cost allocation to harm Covad, and it did.²⁵³

Secondly, Covad alleged that:

The wholesale prices BellSouth offers to ISPs for DSL service, as well as its retail prices for combined DSL and Internet access service, are set so low relative to its unbundled wholesale loop prices that Covad cannot meet BellSouth's wholesale or retail prices and still make a reasonable return on its investment. If Covad charged retail DSL/Internet access customers the same price as BellSouth does, or charged comparable wholesale DSL prices, Covad could not recover the cost of providing the service, e.g., loop costs, collocation costs, transport costs, corporate overhead and sales and market costs.²⁵⁴

The Eleventh Circuit found that Covad's allegations of BellSouth's below cost pricing and BellSouth's probability of recoupment were sufficient to survive a motion to dismiss on a price squeeze claim.²⁵⁵ Upholding the complaint, the court observed that "[t]hese allegations suggest that BellSouth is compensating for deliberately reduced profits on the retail end of its operations with correspondingly greater profits on the wholesale side, in order to stifle competition from firms such as Covad that are both wholesale customers and retail rivals."²⁵⁶

Similarly, deference to procedural posture was accorded the complaint by the court in *Z-Tel Communications, Inc. v. SBC Communications, Inc.*,²⁵⁷ which upheld

249. 374 F.3d 1044, 1049 (11th Cir. 2004).

250. *Id.*

251. *Id.*

252. *Id.* at 1049-50.

253. *Id.* at 1051 (alteration in original) (quoting *Covad* Compl. at ¶¶ 93-95).

254. *Id.* at 1050-51 (quoting *Covad* Compl. at ¶ 92).

255. *Id.* at 1050-51.

256. *Id.* at 1051.

257. 331 F.Supp.2d 513 (E.D. Tex. 2004).

plaintiff's refusal to deal allegations under *Aspen Skiing*.²⁵⁸ Central to the court's determination was its finding that defendant had voluntarily shared network facilities prior to the enactment of the Telecommunications Act.²⁵⁹

In addition, the court upheld plaintiff's leveraging claim.²⁶⁰ In so ruling, the court acknowledged an underlying tension between the holdings in *Kodak*²⁶¹ and *Spectrum Sports*²⁶² but concluded that plaintiff had sufficiently alleged a dangerous probability of success in monopolizing the second market to avoid dismissal under *Trinko*.²⁶³ At the same time, the court relied on *Trinko* to dismiss the essential facilities claim because defendant was required by statute to grant access to its facilities.²⁶⁴

In *Creative Copier Services v. Xerox Corp.*,²⁶⁵ a servicer of high volume copying machines sued a copy machine manufacturer claiming violation of § 2 of the Sherman Act, alleging that Xerox had unlawfully excluded Creative Copier Services (CCS) from the market for servicing high volume copier machines by refusing to sell spare parts to CCS.²⁶⁶ Although the court described CCS's allegations as a claim that "Xerox had 'leveraged' its monopoly in the parts market to gain a monopoly in the service market," the analysis focused on whether Xerox's alleged exclusionary conduct constituted an illegal refusal to deal under *Aspen Skiing*.²⁶⁷

The court ruled that CCS's allegations were sufficient to withstand a motion to dismiss.²⁶⁸ The court noted that CCS and Xerox had a prior course of dealing in spare parts which Xerox ceased for no legitimate business purpose.²⁶⁹ Specifically, CCS alleged that Xerox chose to (1) delay shipping of parts; (2) make parts unavailable; (3) raise prices on certain other parts; and (4) refuse to sell copiers to customers who wished to use CCS as their service provider.²⁷⁰ In so holding, the court specifically rejected Xerox's argument that *Trinko* had imposed a short-term profit sacrifice test in refusal to deal cases.²⁷¹ Nor did *Trinko* heighten the pleading standard in refusal to deal cases.²⁷² In addition, the court specifically rejected Xerox's business justification argument on the grounds that such argument was not appropriate at the motion to dismiss stage.²⁷³ Finally, Xerox's argument that it was free to deal with whomever it pleased was rejected; the court ruled that a monopolistic refusal to deal, which stifles or unnecessarily impairs competition, violates antitrust law.²⁷⁴

258. *Id.* at 538.

259. *Id.* at 536-37.

260. *Id.* at 542-43.

261. *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451 (1992).

262. *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447 (1993).

263. *Z-Tel Communications*, 331 F.Supp.2d at 542-43.

264. *Id.* at 539-40.

265. 344 F.Supp.2d 858 (D.Conn. 2004).

266. *Id.* at 862-63.

267. *Id.* at 862.

268. *Id.* at 866.

269. *Id.*

270. *Id.*

271. *Id.* at n.2.

272. *Id.*

273. *Id.* at 867.

274. *Id.*

In *A.I.B. Express, Inc. v. FedEx Corp.*,²⁷⁵ the court similarly upheld a leveraging claim.²⁷⁶ Plaintiff A.I.B. was engaged in the business of facilitating the shipment of gems and jewelry.²⁷⁷ A.I.B. typically picked up shipments of diamonds or gems from merchants and took them to FedEx offices for over night delivery to buyers.²⁷⁸ A.I.B. used FedEx as its sole shipper.²⁷⁹ Thereafter, FedEx began its own facilitation business and solicited A.I.B. customers but with little success.²⁸⁰ FedEx terminated its pricing agreement with A.I.B., offering an alternative that A.I.B. could not accept because, *inter alia*, it would result in a seventy percent increase in A.I.B.'s shipping rates.²⁸¹

A.I.B. alleged that FedEx had unlawfully sought to leverage its power in the overnight transportation market to monopolize the facilitation market.²⁸² With respect to A.I.B.'s leveraging claims, FedEx moved for judgment on the pleadings, and the court denied the motion.²⁸³ First, the court found that A.I.B. had sufficiently alleged the anticompetitive acts that are the *sine qua non* of a leveraging claim.²⁸⁴ Recognizing *Trinko*'s admonition that *Aspen Skiing* had limited application in refusal to deal cases, the court found that A.I.B.'s allegations of a prior voluntary and profitable course of dealing between A.I.B. and FedEx was sufficient to proceed under *Aspen Skiing*.²⁸⁵ Second, the court emphasized that on a motion for judgment on the pleadings it was obligated to accept the truth of all allegations in the complaint.²⁸⁶

V. SYNTHESIS

The lower courts, post-*Trinko*, have separated the Supreme Court's rhetoric from its doctrinal pronouncements. The courts in telecommunications cases, as well as cases involving antitrust issues generally, have been cautious in deciding monopolization issues.

1. In adjudicating motions to dismiss, the courts have generally accepted as true all the allegations in plaintiffs' complaints and have dismissed only those claims where it is clear that there is no set of facts that would allow recovery.

2. While recognizing that the rule of *Aspen Skiing* is of limited applicability, courts have not rejected the doctrine as *sui generis*.

3. Nor have courts, despite the language of *Trinko*, rejected leveraging as a theory of monopolization.

275. 358 F.Supp.2d 239 (S.D.N.Y. 2004).

276. *Id.* at 250-51.

277. *Id.* at 243.

278. *Id.*

279. *Id.*

280. *See id.* at 244.

281. *Id.*

282. *Id.* at 250.

283. *Id.* at 243, 251.

284. *Id.* at 250-51; *see also* *Applied Medical Resources Corp. v. Ethicon, Inc.*, 2006 WL 1381697, at *5 (C.D. Cal. 2006) (permitting leveraging claim); *but see* *Schor v. Abbott Laboratories*, 457 F.3d 608, 610-14 (7th Cir. 2006) (rejecting monopoly leveraging theory).

285. *A.I.B. Express*, 358 F.Supp.2d at 250-51.

286. *Id.* at 251; *see also* *Schor*, 457 F.3d at 611 (holding that, on a motion for judgment on the pleadings, the court must assume truth of allegations in the complaint).

4. There is unanimity that the essential facilities doctrine does not apply where a seller is required by law or regulation to deal with rivals.

5. Courts, like the Court in *Trinko*, have resisted adoption of a bright-line rule in non-price-based monopolistic refusals to deal.

IV. CONCLUSION

In *Trinko*, the Supreme Court missed a golden opportunity to clarify the law with respect to non-price exclusionary behavior by a monopolist. In underscoring the institutional limitations of the courts and the potential benefits of monopoly, the *Trinko* decision suggests a more hands off approach to monopolization. That view has yet to gain traction in the lower courts, and exclusionary acts by dominant firms continue to receive close judicial scrutiny.

